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Supreme Court, U.S.
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No. _____

The Supreme Court of the United States

JOSEPH P. KOZ,

Petitioner

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45 pp

Questions Presented

1. When a statute states that a military officer "shall … be retired in the highest grade in which he served on active duty satisfactorily … for not less than six months," is an officer entitled to retire in a grade in which he served more-than-satisfactorily for 12 years?

2. If a statute enacted for the benefit of military personnel is susceptible to two different readings, are veterans entitled to the benefit of the most favorable reading?

3. Are statutes afforded their plain meaning unless doing so would be truly and genuinely absurd?

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In the Supreme Court of the United States

JOSEPH P. KOZ,

Petitioner,

v.

UNITED STATES,

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PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

This case is about military officers who dedicate their lives to defending and protecting this nation's rule of law.

Citations

The Court of Federal Claims dismissed Petitioners' complaint in an unpublished decision. Koz v. United States, Fed. Cl. 00-CV-727 (December 20, 2001). A4 - A9. That decision was affirmed by the Court of Appeals for the Federal Circuit pursuant to Fed. Cir. R. 36. Koz v. United States, Fed. Cir. 02-5081 (February 12, 2003). A1.

Jurisdiction

The Federal Circuit judgment was entered on February 12, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision

This case involves the interpretation of 10 U.S.C. § 1370(a), which states in pertinent part:

> (1) Unless entitled to a higher retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, or Marine Corps who retires under any provision of law other than chapter 61 or chapter 1223 of this title shall, except as provided in paragraph (2), be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than six months.
> (2)(A) In order to be eligible for voluntary retirement under any provision of this title in a grade above major or lieutenant commander, a commissioned officer of the Army, Navy, Air Force, or Marine Corps must have served on active duty in that grade for not less than three years....

Statement of the Case

Tucker Act jurisdiction (28 U.S.C. § 1491) is predicated upon 10 U.S.C. §§ 1370 and 8991. Retired military officers are entitled to retired pay commensurate

with the grade at which they retire and the number of years of active service they performed.

The Petitioner, Joseph P. Koz, served for 13 years as a colonel in the United States Air Force. He was retired as a lieutenant colonel on July 1, 1995, however, after the Secretary of the Air Force determined that his service as a colonel during portions of 1994 was not satisfactory. Mr. Koz maintains that he was entitled by law to retire as a colonel by virtue of his 12 illustrious years of service in that grade.

1. Statement of Facts

Mr. Koz served his country as an active duty Air Force officer and fighter pilot for more than 30 years. His career began with a 1965 graduation from the United States Military Academy at West Point, and included 2 tours of duty in Vietnam and 350 combat missions during which he received 27 Air Medals, 5 Distinguished Flying Crosses, and a Bronze Star.

Having steadily progressed through the ranks, often at an accelerated pace, Mr. Koz was promoted to the grade of colonel in 1981. For the next 12 years, Mr. Koz' performance was nothing short of magnificent and impeccable. The direct national security implications of his efforts were nowhere more evident than from his service as the Defense and Air Attache at the U.S. Embassy in Israel during the sensitive time leading up to Operation Desert Storm, which earned him personal commendations from two United States ambassadors. He then moved on to the Defense Intelligence Agency, where his spectacular management of the U.S. Attache System worldwide earned him a second Defense Superior Service Medal.

1993 saw Mr. Koz serving as the Commandant of the highly respected Air Force Institute of Technology [AFIT]. But 1993 also saw Mr. Koz' personal life take a dramatic turn when a leukemia diagnosis was confirmed. This

revelation was so devastating to Mr. Koz that he did not even tell his wife until many years later. As a Command Pilot with more than 2,500 hours in the cockpit, this trauma was compounded by his resulting removal from flying status for the first time in 28 years. And finally came the realization that the only way of life that he had known since high school would come to an end when he would have to retire from military service upon accumulating 30 years of service in 1995. 10 U.S.C. § 634.

Spurred by these cumulative developments, Mr. Koz became preoccupied with two overwhelming goals: to enjoy life while he was still physically able, and to find a civilian job. Unfortunately, these preoccupations caused lapses of judgment that, in turn, led to uncharacteristically inappropriate behavior on Mr. Koz' part. As his second-in-command would later describe it:

> I believe it was possible that Joe Koz was not entirely responsible emotionally for what I characterize as the bizarre behavior that led to his being relieved of command and subsequently disciplined. ... Colonel Koz started to become noticeably very tense during the summer of 1994.... It was apparent to me that he was becoming especially apprehensive about obtaining suitable employment upon his retirement from the Air Force. Our conversations and his behavior convinced me that his level of employment seeking activity and the related apprehension were more than what I would consider "normal" for a retiring Air Force member. To me, Joe was beginning to exhibit what I would characterize as a level of "panic." ... This was a man in distress. ... These actions, in my view, are not those of a calculating, rational individual. I now see them as possibly the actions of an intellectually

> disoriented, emotionally panicked human being who was frightened over the prospect of being unemployed and unemployable after being mandatorily retired from a 30-year Air Force career. Additionally, there were vague indications of serious Koz family health problems, though, except for Mrs. Koz' hip surgery, I have no direct knowledge of other health issues.

This second-in-command was unaware of the impact that the leukemia diagnosis had also had on the "panic" that Mr. Koz was experiencing.

Nonetheless, frequent absences from work inspired an anonymous complaint that triggered an Inspector General investigation that revealed various questionable and uncharacteristic activities associated with Mr. Koz' quest to find and secure a civilian job. On May 11, 1995, Mr. Koz was offered non-judicial punishment [1] for misconduct flowing from the IG investigation. During this process, Mr. Koz called attention for the first time to the "profound effect" that the leukemia diagnosis had had on his conduct. He accepted the imposition of non-judicial punishment "to get the matter resolved as quickly and painlessly as possible for himself and the Air Force." A10.

In light of this non-judicial punishment, however, Mr. Koz' immediate commander initiated proceedings to determine the grade at which he would be permitted to retire.

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[1] Article 15 of the Uniform Code of Military Justice (10 U.S.C. § 815(b)) permits commanders to impose "disciplinary punishments for minor offenses without the intervention of a court-martial." See Dumas v. United States, 620 F.2d 247, 251 (Ct. Cl. 1980), quoting, S. Rep. No. 1911, 87th Cong., 2d Sess. at 2-4 ("The legislative history states definitely that nonjudicial punishment is noncriminal in character and 'in this sense has no connection with the military court-martial system.'").

Mr. Koz made no excuses, but relied solely upon his illustrious and unblemished record during the previous 12 years. That commander recommended that Mr. Koz be retired as a colonel because anything less "would be disproportionate to the offenses he committed and would not properly account for the many valuable years of service he gave to the United States Air Force." The next-higher commander disagreed and recommended retirement as a lieutenant colonel because, "Although superb performance record through a career marked by significant responsibilities stands clear, this illegal action and poor attitude concerning obligations to the USAF during 1994 warrant strong disciplinary measures." The Secretary's designee adopted the latter recommendation, found that Mr. Koz had not served satisfactorily in the grade of colonel, and directed his retirement as a lieutenant colonel on July 1, 1995.

2. The Proceedings Below

Following his retirement as a lieutenant colonel, Mr. Koz applied to the Air Force Board for Correction of Military Records [AFBCMR] [2] asking that his retired grade be changed to colonel. He maintained, *inter alia*, that he met the standard contemplated by Section 1370 through "demonstrated excellence in all that he accomplished on behalf of the Air Force for 12 years [notwithstanding that] in the 13th year he took some missteps." [3] A majority of the

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[2] 10 U.S.C. § 1552. See Chappell v. Wallace, 462 U.S. 296, 303 (1983); Clinton v. Goldsmith, 526 U.S. 529, 539 (1999).

[3] Mr. Koz also maintained that his lapses of judgment were mitigated by the emotional trauma that he underwent at the time, which a clinic psychologist described as follows:

> The response to a terminal illness can best be understood by recognizing that typically the initial diagnosis is in and of itself a shock and often met with disbelief, anxiety and denial.

AFBCMR members recommended that Mr. Koz' record be corrected to show that "he served satisfactorily in the grade of colonel within the meaning of Section 1370(a), Title 10, United States Code." A17. They did so in recognition of Mr. Koz' "outstanding career for 28 years," including 12 years of excellence as a colonel. A16-A17. A lone dissenting AFBCMR member urged that Mr. Koz' application be denied because his "one year of significant misconduct offsets his prior years of distinguished service."

> ... The patient's behavioral and psychological responses in such circumstances are most likely not representative of a rational, logical individual. ... It would not be unusual for a patient's behavior when diagnosed with any form of terminal cancer to be characterized by fear and anxiety regarding all aspects of the future. ... It is very important to note the fact that [Mr.] Koz did not discuss or reveal his diagnosis to even his wife. ... Thus, it is likely to assume that he had very little support or empathy in his interpersonal environment at the time of this diagnosis. Thus, his behavior is described to have been out of the norm for him as he faced both the diagnosis of terminal illness and simultaneously a mandatory retirement after 30 years as an Air Force officer. It is within reasonable psychological probability to conclude that he was experiencing extreme apprehension and anxiety about his future in terms of survival. ... It was my opinion as I understood [Mr.] Koz that he wanted to live as fully as possible in the present with the knowledge that his time without symptoms was not predictable.

Although "majority vote constitutes the action of the Board," favorable actions have no finality unless unanimous. 32 CFR §§ 865.4 (l) and (p). Thus, Mr. Koz' case was forwarded for final action to the Secretary's designee who agreed with the AFBCMR minority and denied the application. A 21-22.

Mr. Koz filed suit in the U.S. Court of Federal Claims maintaining that Section 1370(a)(1) mandated his retirement as a colonel because he had "served on active duty satisfactorily ... for not less than six months" in that grade. The Court acknowledged that "the statute may support such an interpretation grammatically." A5. It granted summary judgment for the Air Force, however, because "a Court cannot attribute absurd results to acts of Congress [and we] cannot imagine that Congress intended to guarantee retirement to an officer based on his or her first six months of duty." A5, A7.

Mr. Koz reiterated his position before the U.S. Court of Appeals for the Federal Circuit, which affirmed without comment or opinion. A1.

Arguments

1. The Plain Meaning of the Statutory Language.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). Analysis of the statutory provision at issue is facilitated by simply obscuring the discretion-conferring clause ("as determined by the Secretary of the military department concerned") from the middle of the sentence. The operative language would then state that an officer "shall ... be retired in the highest grade in which he served on active duty satisfactorily for not less than six months." It is hard to imagine any more plain and unambiguous language. Because

the phrase "for not less than six months" qualifies the immediately preceding word "satisfactorily," Mr. Koz was legally entitled to retire as a colonel by virtue of his 12 years of more-than-satisfactory service in that grade.

If Congress had meant to provide that officers are retired at the highest grade in which they have served at least six months provided the Secretary determines that all of that service was satisfactory, there were many ways for it to say so. One way was to use those words in the statute. Another was to provide that officers must have "served satisfactorily on active duty for not less than six months," thereby having the six-month clause modify the active duty requirement rather than the subordinate satisfactory determination. As enacted, however, Section 1370(a)(1)'s six-month clause applies directly to the satisfactory determination, and means that Mr. Koz was unlawfully denied retirement as a colonel.

2. Any Ambiguity Should be Resolved in Veterans' Favor.

Even if the statutory language is susceptible to two different interpretations, veterans should receive the benefit of the most favorable reading.

This Court has repeatedly invoked that interpretive canon that statutes enacted to benefit servicemembers must be liberally construed in their favor. King v. St. Vincent's Hospital, 502 U.S. 215, 220-21 n. 9 (1991), citing, Fishgold v. Sullivan Drydock Repair Corp., 328 U.S. 275, 285 (1946); Boone v. Lightner, 319 U.S. 561, 575 (1943). Retirement is one of the paramount tangible benefits that Congress has conferred upon servicemembers. Section 1370 is central to that benefit because it affects the grade in which they will enjoy it.

Mr. Koz maintains that six months is the minimum period of satisfactory service that will authorize retirement in a grade. To the extent that the text of Section 1370(a)(1) might also be read to mean that all of an officer's service in a

grade must be satisfactory, that reading should be rejected in favor of Mr. Koz' more beneficial (and faithful) interpretation.

3. The Plain Meaning of Section 1370(a)(1) is not Absurd.

The rule that absurd interpretations of statutes should be rejected

> remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone.

Public Citizen v. Department of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). See Conroy v. Aniskoff, 507 U.S. 511, 517-18 (1993) ("we cannot say that Congress would have found our straight-forward interpretation and application of its words either absurd or illogical"). [4] A literal interpretation of Section 1370(a)(1) is not absurd in the least.

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[4] See also Crooks v. Harrelson, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with Congress [which] may amend the statute; we may not.").

First, no military member is **ever** "guaranteed" retirement. [5] All are subject to dismissal for criminal conduct that is deemed serious enough to warrant court-martial under the Uniform Code of Military Justice. 10 U.S.C. Chapter 47. Indeed, even already-retired personnel may be dismissed from the military, and thereby stripped of the retirement benefits that they previously enjoyed. United States v. Overton, 24 M.J. 309 (CMA), cert. denied, 484 U.S. 976 (1987); Hooper v. United States, 326 F.2d 982 (Ct. Cl.), cert. denied, 377 U.S. 977 (1964). In less egregious circumstances, service members are subject to administrative separation for wrongdoing ranging from substandard performance to outright misconduct. 10 U.S.C. § 1181. In short, it is not absurd for Section 1370 to be excluded from the arsenal of disciplinary mechanisms that are available to military authorities, but that it chose not to employ in his case.

Moreover, a literal reading of Section 1370(a)(1) is entirely compatible with related statutory provisions. Section (a)(1) prescribes the minimum time (6 months) that an officer must serve satisfactorily in a grade in order to retire in that grade. Section (a)(2) adds an additional requirement before officers may retire in the higher grades. Reading (a)(1) and (2) together, retirement in the higher grades requires at least 3 years of service in that grade, at least 6 months of which was satisfactory. This is not absurd because it does not apply "looser standards" to senior officers (A7); it applies the same standard **plus** a longevity requirement.

Finally, "Our country has a long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has 'always been deemed to be legitimate.'" Regan v. Taxation With Representation of Washington, 461 U.S. 540, 551 (1983), quoting, Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279, n. 25 (1979) (footnote omitted).

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[5] Contra A7.

A literal interpretation of Section 1370(a)(1) is consistent both with that policy as well as overall legislative intent.

Congress has explained that officers' commissions entail a form of job security akin to tenure. S. Rep. 2420, 84th Cong., 2d Sess., reprinted in 1956 *U.S. Code and Administrative News* at 3351. It is not genuinely absurd, illogical, or even unexpected for that tenure to include the attachment of retirement eligibility upon six months of satisfactory service in a grade. [6]

Just as courts should avoid rejecting administrative interpretations just because they are deemed susceptible of improvement, courts should avoid overriding the plain meaning of statutes with which they might simply disagree.

Conclusion.

It has been said, "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat." United States v. Wunderlich et al., 342 U.S. 98, 101 (1951) (Douglas, J., dissenting). If so, the law has reached its lowest point here. Under the Air Force interpretation that the lower courts have sanctioned, the Secretary of a military department has unlimited discretion to determine not only whether a prescribed period of service was "satisfactory," but also whether an entire period of service merited retirement in a particular grade. This "goes beyond the meaning that the statute can bear." MCI Telecommunications Corp. v. A.T. & T. Corp., 512 U.S. 218, 229 (1994).

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[6] See also 10 U.S.C. § 1401(b) (retirees receive benefit of most favorable calculation of retired pay).

Respectfully submitted,

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May 12, 2003

Appendix

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

02-5081

JOSEPH P. KOZ,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

In CASE NO(S). 00-C V-727

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36

Per Curiam (NEWMAN, MICHEL, and PROST, Circuit Judges).

ENTERED BY ORDER OF THE COURT

Jan Horbaly, Clerk

DATED: FEB 12 2003

In the United States Court of Federal Claims

No. 00-727 C

JOSEPH P. KOZ,

v. JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed December 19, 2001, granting defendant's motion for judgment on the Administrative Record and denying plaintiff's cross-motion,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is for defendant and the complaint is dismissed. No costs.

Margaret M. Earnest
Clerk of Court

December 20, 2001

By: _____
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 00-727C
(Filed: December 19, 2001)

* * * * * *

JOSEPH P. KOZ, *

Plaintiff, * THIS OPINION AND ORDER WILL NOT BE PUBLISHED

v. *

UNITED STATES OF AMERICA, *

Defendant. *

* * * * * *

Guy J. Ferrante, King & Everhard, P.C., Springfield, VA, for plaintiff.

John C. Einstman, United State Department of Justice, Washington, D.C., for defendant.

OPINION and ORDER

HODGES, Judge.

Plaintiff was a Colonel in the Air Force from 1981 until his voluntary retirement in 1994. He agreed to retire after an investigation by the Inspector General determined that he had violated various provisions of the Uniform Code of Military Justice.

The Air Force allowed plaintiff to retire but not at the rank of Colonel. A designee of the Secretary of the Air Force

determined that plaintiff's service as Colonel had not been "satisfactory" within the meaning of 10 U.S.C. § 1370(a) (2001). This case turns on the proper interpretation of that statute.

Plaintiff argues that the statute requires only that an officer serve satisfactorily for six months after which he cannot be retired at a lower grade. While the statute may support such an interpretation grammatically, a court cannot attribute absurd results to acts of Congress. We grant defendant's motion for summary judgment.

BACKGROUND

Plaintiff became a Colonel in the Air Force in December 1981. After several years of satisfactory service, an Inspector General's investigation established that plaintiff had violated Uniform Code of Military Justice in several respects. These included inappropriate off-duty employment, misuse and abuse of temporary duty assignments, and being AWOL. Plaintiff was offered non-judicial punishment proceedings for charges of disobeying an order, dereliction of duty, false monetary claims against the United States, and conduct unbecoming an officer and a gentleman.

Plaintiff accepted non-judicial punishment rather than trial by court martial. He was found guilty in May 1995, and he agreed not to appeal. His sentence was forfeiture of a portion of his pay for 2 months. Plaintiff then asked to be allowed to be retired as a Colonel, but the Staff Judge Advocate recommended to plaintiff's commander that he be retired in the grade Lt. Colonel. The Judge Advocate found that the plaintiff's conduct "jeopardized the core values of the Air Force, and indicated a reckless disregard of regulations and a lack of integrity." His judgment of plaintiff in that regard is fully and carefully documented in the record. "Colonel Koz repeatedly used his position for his own gain... [He] lost sight of his duty as an officer and a member of the Air Force. Leadership carries with it responsibilities

and certainly, accountability. Colonel Koz must be held accountable for his actions."

The Secretary of the Air Force determined in June 1995 that plaintiff had not served satisfactorily in the grade of Colonel and directed that he be retired as Lt. Colonel. Plaintiff appealed to the Board for Correction of Military Records, arguing that an earlier diagnosis of leukemia and anxiety over his retirement had caused the behavioral problems that stained an otherwise sterling career. A majority of the Board agreed that plaintiff's misconduct had been offset by many years of distinguished service, but the Secretary of the Air Force rejected the Board's recommendation that plaintiff be retired in the grade of Colonel. Plaintiff filed suit here asking that his military records be corrected to reflect that he retired as a full Colonel.

DISCUSSION

Plaintiff makes the following arguments to support his case: (1) The plain language of §1370(a)(l) does not permit retirement of an officer in a lower rank after 6 months satisfactory service in that grade; and (2) the actions of the Secretary of the Air Force in overruling the Board for Corrections of Military Records were "manifestly arbitrary and capricious."

It is important to note what plaintiff does *not* argue. He does not argue that he was promised retirement at the grade of Colonel if he retired voluntarily. He does not argue that any other promises were made to him that might have rendered an otherwise voluntary retirement involuntary. He does not argue that an officer cannot be retired in a lesser grade absent a court martial conviction or other proceedings that did not occur.

1.

The primary issue in this case is the meaning of Title 10, § 1370. That section provides:

> (a) Rule for Retirement in Highest Grade Held Satisfactorily. (1) Unless entitled to a higher retired grade ... a commissioned officer ... who retires ... shall, except as provided in paragraph (2), be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than 6 months.
>
> (2)(A) In order to be eligible for voluntary retirement ... in a grade above Major or Lt. Commander, a commissioned officer ... must have served on active duty in that grade for not less than 3 years ....

10 U.S.C. § 1370(a)(l)-(2)(A).

Plaintiff interprets section (a)(l) to mean that once an officer has served 6 months in a given rank satisfactorily, that person can never be retired at a lesser rank. He also argues, apparently in the alternative, that section (a)(l) does not apply at all because section (a)(2) covers ranks above Major or Lt. Commander. We cannot imagine that Congress intended to guarantee retirement to an officer based on his or her first six months of duty, or that even looser standards should apply to higher ranking officers.

Statutes should be interpreted so that meaning is given to each provision. Magnesium Corp. of America v. United States, 166 F.3d 1364, 1371 (Fed. Cir. 1999). Both paragraphs of this section have logical meaning if they are read to require that an officer serve in his current rank for at least 6 months *and* serve satisfactorily during his tenure in that rank, before he may retire at that rank. If the officer is a Lt. Colonel or Commander or higher, he must serve in rank for at least 3 years before he can retire. In other words, lower-ranking officers must serve at least 6 months in grade; senior officers at least 3 years. Everyone must serve satisfactorily as determined by the Secretary. Whether a

particular officer has served satisfactorily is a decision to be made exclusively by the military, so we do not address that issue.

2.

Plaintiff's second argument, that the Secretary acted arbitrarily and capriciously, seems to depend mostly on his interpretation of the statute. That is, the Secretary determined that plaintiff's retirement in a lesser grade was lawful and that determination was erroneous; therefore, her determination was arbitrary and capricious. This is a circular argument that in any event is disposed of by the statutory interpretation described above.

Plaintiff claims that the Secretary's decision to disagree with the majority of the AFBCMR, which recommended that Mr. Koz be retired as Colonel, is "manifestly arbitrary and capricious." The Secretary has the authority to disagree with the Board's recommendation, however. Exercising the option to disagree is not arbitrary or capricious. It was not contrary to law, regulation, or procedure either. The Secretary of the Air Force made her decision after having "carefully considered all of the circumstances of this case" and having concluded that she "(does) not agree with the recommendation of the majority of the AFBCMR Panel."

Plaintiff makes an assertion that the Secretary found his service unsatisfactory "merely because of dissatisfaction with the punishment he had previously received." That charge is not supported by the record. We have reviewed the administrative record carefully in light of plaintiff allegations and found no reason to question the Secretary's diligence.

This case highlights the importance of a court's deference to persons who are authorized by Congress to make military personnel decisions. Plaintiff complains that the Secretary "ignored and/or disregarded the mitigating effect that Lt. Colonel Koz's leukemia diagnosis had on his judgment in 1994. There is no evidence that that factor was considered at <u>any</u> stage of the grade determination action."

Yet the record contains the following statement of a medical consultant to the Board for Correction of Military Records:

> Therefore, to assert that concern over a "life threatening" disease was proximate to a "panic" state that affected [plaintiff's] judgment and rational thinking is untenable and unsupportable. Indeed, [plaintiff] met a Medical Evaluation Board in 1993 that found him fit and returned him to duty to finish out his 30 year career.

The medical consultant reviewed plaintiff's "entire case file" and the Air Force Secretary "carefully considered all of the circumstances of this case" before issuing her ruling. Assuming as we must that the Secretary carried out her official duties correctly, fairly, in good faith, and in accordance with the law and governing regulations, such facts are dispositive of plaintiffs charges.

CONCLUSION

Congress requires that appropriate military authorities determine whether an officer has served satisfactorily at the rank in which the officer wishes to retire. In this case, the Secretary of the Air Force determined that plaintiff's service as a Colonel was not satisfactory. Her decision to retire plaintiff in the grade of a Lt. Colonel was lawful. Her actions in all respects were supported by the Administrative Record. She did not act arbitrarily or capriciously in carrying out her responsibilities.

Defendant's motion for judgment on the Administrative Record is GRANTED. Plaintiffs cross-motion is DENIED. The Clerk will enter judgment for defendant. No costs.

Robert H. Hodges, Jr.
Judge

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: 98-01802
INDEX CODE: 133.00

JOSEPH P. KOZ COUNSEL: FRANK J. SPINNER

027—32—3544 HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

His grade of colonel (0-6) be reinstated and his records be corrected to reflect retirement in the grade of colonel, effective 1 Jul 95.

APPLICANT CONTENDS THAT:

In mid-1994, he faced the prospect of mandatory retirement and was also living with a diagnosis of leukemia. In retrospect, and after talking to a psychologist, he realized that both matters affected his judgment and behavior to a degree that he did not appreciate at the time. In his last year of service as the Air Force Institute of Technology (AFIT) commandant, he was confronted with the realization that his military career had to end and he had to look for new employment. His response to this realization led him to engage in conduct that was questioned by his commander and some of his subordinates. An IG investigation was initiated and Article 15 punishment was subsequently imposed. The primary claims against him involved questionable TDY practices and off-duty employment.

He accepted nonjudicial punishment proceedings because he wanted to get the matter resolved as quickly and painlessly as possible for himself and the Air Force. In his letter to

SAF/IGQ and in his response to the Article 15, he explained his state of mind at the time he began off-duty employment and the circumstances related to the TDY trips in question. Additionally, in making the decision to accept Article 15 proceedings, it never occurred to him that by receiving punishment, his record would actually be reviewed to determine his retirement grade. His Air Force defense counsel never informed him that such a possibility was likely. Had he been properly informed before the fact, he may well have made a number of different decisions to develop and present evidence. The potential emotional and financial impact of retiring at a lesser grade is considerably higher than the impact flowing from nonjudicial punishment. He feels as though he was blindsided by the Air Force.

He was granted a 30% disability for his leukemia by the Department of Veteran's Affairs. In support of his request, applicant submits an affidavit, counsel's Brief, letters from former AFIT vice commandants, a letter from a clinical psychologist, copies of the Secretarial grade determination, the Article 15 and additional documents associated with the issues cited in his contentions. These documents are appended at Exhibit A.

STATEMENT OF FACTS:

On 9 Jun 65, the applicant was commissioned a second lieutenant in the Regular Air Force. He was progressively promoted to the grade of colonel, with a date of rank (DOR) of 28 Dec 81 and an effective date of 1 Aug 82.

The applicant's 8 Dec 94 request for voluntary retirement, effective 31 Jan 95, was approved by the commander.

A SAF/IG inquiry was conducted concerning the applicant's alleged inappropriate off-duty employment, misuse and abuse of temporary duty (TDY) assignment and permissive

TDY, absent from Air Force duties while not on leave, and not wearing a uniform to work. The 19 Jan 95, IG Summary Report of Investigation indicated that allegations of holding full-time employment, holding basketball practices during normal duty hours, coming to work for only short periods of time, not wearing a uniform to work, and using permissive TDY for inappropriate purposes were substantiated. The allegations of not being on leave while performing off-duty employment and making dubious TDY trips were partially substantiated (see Exhibit B).

On 11 May 95, applicant was notified of his commander's intent to impose nonjudicial punishment (Article 15) for alleged misconduct, on divers occasions between the periods of 2 Feb 94 and 8 Dec 94, in violation of Articles 90, 92, 132 and 133, UCMJ. The applicant consulted a lawyer, waived his right to demand trial by court-martial, accepted nonjudicial punishment and attached a written presentation. After considering all matters presented to him, the commander found that the applicant did commit one or more of the offenses alleged. The commander imposed punishment of forfeiture of $2,979 pay per month for two months. Applicant did not appeal the nonjudicial punishment.

On 15 May 95, the applicant was notified of his commander's intent to request the Secretary of the Air Force determine whether the applicant served satisfactorily in the grade of colonel under the provisions of 10 USC 1370. The applicant acknowledged receipt of the notification and subsequently submitted a personal statement requesting that he be retired in the grade of colonel. On 25 May 95, applicant's commander recommended the applicant be retired in the grade of colonel. On May 95, the Air Education and Training Command (AETC) vice commander recommended the applicant be retired in the grade of lieutenant colonel and requested the case file be forwarded to

the Secretary of the Air Force. On 20 Jun 95, the Secretary of the Air Force found that the applicant did not serve satisfactorily in the grade of colonel and directed that he be retired as a lieutenant colonel on 1 Jul 95.

On 30 Jun 95, the applicant was relieved from active duty and retired effective 1 Jul 95 in the grade of lieutenant colonel under the provisions of AFI 36-3203 (maximum service or time in grade). He had completed a total of 30 years and 22 days of active service for retirement.

The relevant facts pertaining to the applicant's medical condition are contained in the letter prepared by the AFBCMR Medical Consultant. Accordingly, there is no need to recite these facts in this Record of Proceedings.

AIR FORCE EVALUATION:

The AFBCMR Medical Consultant, stated that the applicant was diagnosed in Nov 92 with chronic lymphocytic leukemia (CLL), an overproduction of lymphatic cells in the bone marrow. Erratic and uncharacteristic behavior between Feb and Dec 94 led to an Article 15, which was the basis for the grade determination. Applicant/counsel argue that excessive concern over the applicant's approaching mandatory retirement date plus the diagnosis of leukemia caused the applicant to perform irrationally in the last year of his service; that he was not responsible for his actions; and, therefore, should not have been subject to his grade reduction.

The AFBCMR Medical Consultant indicated that at the time the diagnosis of CLL was made, the applicant's treating physician stated the applicant "has an excellent prognosis with no change in life expectancy." The applicant has never required any treatment for this disease, and most likely never will other than periodic checks of his blood count. CLL,

while diagnostically a cancer, is not a disease that normally affects a person's longevity or general health. Therefore, to assert that concern over a "life-threatening" disease was proximate to a "panic" state that affected the applicant's judgment and rational thinking is untenable and unsupportable. The applicant met a Medical Evaluation Board (MEB) in 1993 that found him fit and turned him to duty to finish out his 30-year career.

The AFBCMR Medical Consultant stated that nothing in the records available for review supports the contention that the applicant had a medical condition that could conceivably have contributed to his 1994 behavior that resulted in his nonjudicial punishment and lowered retirement grade. The AFBCMR Medical Consultant is of the opinion that no change in the records is warranted and the application should be denied (Exhibit D).

The General Law Division, HQ USAF/JAG, stated that the applicant agues his distinguished service as a colonel (0-6) from 1981 through 1994 greatly outweighs the relatively minor misconduct alleged in 1994, making his service as an 0-6 more than satisfactory. He denies that he committed the alleged offenses in 1994. The applicant indicated that his earlier diagnosis of leukemia, when coupled with his anxiety over his impending mandatory retirement, caused adverse psychological effects and maladaptive behavior.

JAG stated that the clinical psychologist's opinion is based or the applicant's representation that he was diagnosed with *terminal* cancer. However, as the AFBCMR Medical Consultant explained, the applicant was diagnosed with a type of leukemia that is not only non-terminal, but normally requires no treatment and has no adverse effect on the person's longevity or general health. JA indicated that the applicant had ample opportunity to convince the commander imposing nonjudicial punishment that he was not guilty of

any offense, but he was unable to do so. The applicant has failed to provide any new evidence that would compel a different conclusion, save the psychologist's report discussed (dismissed) above and the suggestion of a former colleague that the applicant's "bizarre" behavior was indicative of a lack of mental responsibility at the time. The MAJCOM legal review of the grade determination action contains a sufficient recitation of the facts to persuade JAG that the misconduct allegations were well founded.

JAG stated that there is no dispute the applicant served the Air Force admirably in all assignments as a colonel except the last; and, a grade determination should consider the member's entire service at the higher grade to determine whether, on the whole, it was "satisfactory." However, there is no simple mathematical formula for balancing 12 years of excellent service against one year of significant misconduct. The Secretary's designee determined the repeated and serious nature of the misconduct warranted retirement in the lower grade. JAG indicated that the AFBCMR should overturn the designee's decision only if it finds it so lacking in reason or factual support as to constitute an injustice. JAG sees no compelling reason to do so. Accordingly JAG recommended the applicant's request be denied (Exhibit E).

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel reviewed the advisory opinions and indicated that the applicant is not claiming any sort of complete mental responsibility "defense." Psychological factors, however, are relevant to issues of mitigation and extenuation. Therefore, the evidence and statements provided with the application warrant consideration in balancing the applicant's record as a colonel over 13 years against the stresses he faced in his final year of active duty. The applicant has also provided an additional statement addressing the points raised by the JAG advisory writer with respect to what he [applicant]

experienced when he learned of his leukemia diagnosis. Ultimately, they believe that an injustice occurred (refer to Exhibit G).

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. The evidence of record reflects that, subsequent to his receipt of nonjudicial punishment under Article 15, a Secretarial determination was made that the applicant had not served satisfactorily in the grade of colonel, and that he should be retired in the grade of lieutenant colonel. While we have founds no evidence which has shown to our satisfaction that the Article 15 punishment was improper or an abuse of discretionary authority, it is the opinion of the Board majority that approval of the requested relief would be appropriate based on the following considerations. After a thorough review of the evidence, the Board majority noted that the applicant had an outstanding Air Force career for 28 years and prior to the grade determination, with the exception of the infractions which led to the imposition of the Article 15, he had performed his duties faithfully and well in the grade of colonel for more than 12 years. The Board majority believes it is significant that the applicant could have been tried by court-martial for the offenses for which the Article 15 was imposed. A conviction by a court-martial would have carried a more severe punishment than that imposed by the nonjudicial punishment, e.g., reduction in grade and/or dismissal from the service. At the time the officer grade determination package was initiated, the applicant's superior (the Air University commander and a

lieutenant general) recommended the applicant be retired in the grade of colonel, noting that the vast majority of his service career and particularly that as a colonel, the applicant was an "excellent" performer and expressing the opinion that a "reduction in his rank would be disproportionate to the offenses he committed and would not properly account for the many valuable years of service he gave to the Air Force." Based on the above, the Board majority believes that, being closer to events, the opinion of the applicant's superior deserves considerable deference in this matter. In view of the above, the Board majority believes that the applicant's retirement in the grade of lieutenant colonel was excessively harsh and, therefore, unjust and that the Article 15 was sufficient punishment for his misconduct. Accordingly, the Board majority recommends that the applicant's records be corrected to reflect that he retired in the grade of colonel.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that:

a. The Secretary of the Air Force found that he serve satisfactorily in the grade of colonel within the meaning of Section 1370(a), Title 10, United States Code, and directed that be retired in that grade.

b. On 30 June 1995, he was relieved from active duty and effective 1 July 1995, he retired for length of service in the grade of colonel.

The following members of the Board considered this application in Executive Session on 27 September 1999, under the provisions of AFI 36-2603:

Mrs. Barbara A. Westgate, Panel Chair
Mr. Vaughn E. Schlunz, Member

Mr. Steven A. Shaw, Member

Messrs. Schlunz and Shaw voted to grant the relief sought in this application. Mrs. Westgate voted to deny the applicant's request and submitted a minority report which is attached at Exhibit H. The following documentary evidence was considered:

Exhibit A.	DD Form 149, dated 25 Jun 98, w/atchs.
Exhibit B.	Applicant's Master Personnel Records.
Exhibit C.	SAF/IG Report of Inquiry, dated 19 Jan 95 (withdrawn).
Exhibit D.	Letter, AFBCMR Medical Consultant, dated 22 Sep 98.
Exhibit E.	Letter, HQ USAF/JAG, dated 18 Dec 98.
Exhibit F.	Letter, AFBCMR, dated 18 Jan 99.
Exhibit G.	Letter from counsel, dated 19 Mar 99, and letter from applicant, dated 19 Mar 99.
Exhibit H.	Minority Report.

BARBARA A. WESTGATE, Panel Chair

DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary **22 Feb 2000**

MEMORANDUM FOR THE EXECUTIVE DIRECTOR,
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS (AFBCMR)

FROM: SAF/MI

SUBJECT: BCMR Case on Lieutenant Colonel Joseph P. Koz, 027-32-3 544, USAF, Retired

I have carefully considered all of the circumstances of this case and do not agree with the recommendation of the majority of the AFBCMR panel that the Secretarial decision that the applicant did not serve satisfactorily in the grade of colonel pursuant to Section 1370(a), Title 10, United States Code, was too harsh, and, therefore, unjust.

On May 15, 1995, the Commander, Air University (AU) notified the applicant of his intention to request a Secretarial Determination of Satisfactory Service pursuant to AFI 36-3203 and 10 USC 1370(a). He based his request on applicant's application to retire from active duty and his receipt of an Article 15 under the Uniform Code of Military Justice (UCMJ) on the same date. On this date, applicant was punished for three specifications of dereliction of duty, three specifications of filing false claims and one specification of conduct unbecoming an officer. He received a forfeiture of $2,979.00 per month for two months. Upon being given the opportunity to present matters for the Secretary to consider in determining whether his service was satisfactory, the applicant asked to be allowed to retire in the grade of colonel. On May 25, 1995, after considering the matters presented by the applicant, the AU Commander

recommended that he be retired in the grade of colonel.

On May 31, 1995, the Vice Commander, Air Education and Training Command (AETC/CV) disagreed and recommended the applicant be retired in the grade of lieutenant colonel because of his documented misconduct. He stated that although a superb performance record through a career marked by significant responsibilities stands clear, this illegal action and poor attitude concerning obligations to the USAF during 1994 warrant strong disciplinary measures. If his only error had been one of judgment in pursuing post retirement employment opportunities prematurely, he could concur with the recommendation for retirement as a colonel. In his view, however, it was clear that, with premeditation, the applicant concocted several TDYs simply to facilitate interviews. Moreover, despite strong feedback from his subordinates that his actions were affecting both the morale and performance of his people, and despite a direct order from his commander to cease and desist, he continued with inappropriate, unauthorized, and illegal activities. The AETC/CV concluded by stating that this reflects a total disregard for his unit, his people, the organizational Air Force or established standards of conduct for an officer particularly of his grade.

On June 20, 1995, the then Deputy for Air Force Review Boards announced that the Secretary of the Air Force found that the applicant did not serve satisfactorily in the grade of colonel within the meaning of Section 1370(a), Title 10, United States Code. However, the Secretary found that he served satisfactorily in the grade of 0-5 and directed that he be retired as lieutenant colonel on July 1, 1995.

In his application to the AFBCMR, applicant asserts, essentially, that his distinguished service as a colonel from 1981 through 1994 greatly outweighs the relatively minor misconduct alleged in 1994, making his service as a colonel

more than satisfactory; that his behavior caused "perceptions" of impropriety, but he accepted the Article 15 process not because he was guilty but solely to resolve the matter quickly; and that his earlier diagnosis of leukemia, when coupled with his anxiety over his impending mandatory retirement, caused adverse psychological effects and maladaptive behavior.

HQ USAF/JAG and the Chief Medical Consultant, AFBCMR, found no merit in the applicant's assertions and recommend that his application be denied. HQ USAF/JAG, advises, among other things, that whether a string of incidents in the final year is sufficient to render the entire service as a colonel unsatisfactory is a matter of judgment to be exercised by the Secretary or his designee. Here, the designee determined that the repeated and serious nature of the misconduct warranted retirement in the lower grade. The AFBCMR's task is not to decide whether it would have reached the same conclusion had it been the decision-maker. Rather, the AFBCMR should overturn the designee's decision only if it finds it so lacking in reason or factual support as to constitute an injustice.

The AFBCMR panel finds no error in the Secretarial decision that the applicant did not serve satisfactorily in the grade of colonel. Nonetheless, in consideration of all of the circumstances of this case (i.e., the applicant's lengthy record of outstanding service, the fact that the misconduct was disposed of by nonjudicial punishment as opposed to courts-martial and the recommendation from the AU Commander), the majority of the AFBCMR panel concludes that the Secretarial determination that the applicant did not serve satisfactorily in the grade of colonel was too harsh and, therefore, unjust. Noting the flagrant misconduct committed by the applicant, the minority member of the AFBCMR panel does not believe that the Secretarial decision was overly harsh and believes the applicant's request should be

denied. I agree.

The AFBCMR has considerable discretion in determining what set of circumstances constitute either an error or an injustice and, as a consequence, its recommendation is entitled to considerable deference. I note, however, that the courts have defined injustice as treatment by military authorities which shocks the sense of justice. Given the gravity of the offenses committed, I do not find his treatment by the military shocking in the least. Quite the contrary, he appears to have been fortunate that courts-martial charges were not preferred whereby, if convicted, the penalty could have far exceeded retirement in a lower grade. In view of the foregoing and in the absence of clear-cut evidence that he was falsely accused, it is my decision that his application be denied.

RUBY B. DEMESME
Assistant Secretary of the Air Force
(Manpower, Reserve Affairs,
Installations and Environment)

10 U.S.C. § 1370(a)

(1) Unless entitled to a higher retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, or Marine Corps who retires under any provision of law other than chapter 61 or chapter 1223 of this title shall, except as provided in paragraph (2), be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than six months.

(2)(A) In order to be eligible for voluntary retirement under any provision of this title in a grade above major or lieutenant commander, a commissioned officer of the Army, Navy, Air Force, or Marine Corps must have served on active duty in that grade for not less than three years, except that the Secretary of Defense may authorize the Secretary of a military department to reduce such period to a period not less than two years in the case of retirements effective during the period beginning on October 1, 1990, and ending on December 31, 2001.

(B) The President may waive subparagraph (A) in individual cases involving extreme hardship or exceptional or unusual circumstances. The authority of the President under the preceding sentence may not be delegated.

(C) In the case of a grade below the grade of lieutenant general or vice admiral, the number of members of one of the armed forces in that grade for whom a reduction is made during any fiscal year in the period of service-in-grade otherwise required under this paragraph may not exceed the number equal to two percent of the authorized active-duty strength for that fiscal year for officers of that armed force in that grade.

(3) A reserve or temporary officer who is notified that he will be released from active duty without his consent and

thereafter requests retirement under section 3911, 6323, or 8911 of this title and is retired pursuant to that request is considered for purposes of this section, to have been retired involuntarily. An officer retired pursuant to section 1186(b)(1) of this title is considered for purposes of this section to have been retired voluntarily.